No. _____

IN THE

Supreme Court of the United States

KENNY D. HASSEY,

Petitioner,

v.

CITY OF OAKLAND,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First District

PETITION FOR WRIT OF CERTIORARI

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December 15, 2008

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*), precludes employers from passing their cost of in-house training to employees through the use of a "training cost reimbursement agreement" where the parties purport to authorize the employer to withhold the employee's final paycheck and/or to sue the employee for breach of contract should the employment relationship terminate before a specified date.

2. Whether the California Court of Appeal impermissibly departed from a well-established federal policy enunciated by the regulations and interpretations of the Administrator for the Wage and Hour Division of the United States Department of Labor that conclude that the "free and clear" payment requirement of the Fair Labor Standards Act (29 C.F.R. § 531.35) renders unenforceable an employer mandated training reimbursement agreement where the amount of the reimbursement sought deprives the employee of the federal minimum wage.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1 and Rule 29.6, the following list identifies all of the parties appearing here and in the court below:

The Petitioner here and in the California Court of Appeal is Kenney D. Hassey, a U.S. citizen. Individuals Matthew Delorenzo and Chris Baker, withdrew their appeals. They are not parties to this proceeding.

The Respondent here and in the California Court of Appeal is the City of Oakland, a municipal corporation. Richard Word, Chief of Police, for the City of Oakland was a respondent in the Court of Appeal but was dismissed from this action and is not a party to this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Federal Cases

United States Code

Code of Federal Regulations

U.S. Department of Labor Wage and Hour Opinion Letters

Other Authorities

INTRODUCTION

In this matter, the California Court of Appeal affirmed a trial court's grant of summary judgment to an employer seeking to enforce a "training cost reimbursement agreement." Under the agreement, the City of Oakland, (hereinafter "the City" or "the employer") required the employee, petitioner Kenny D. Hassey, to pay it $8,000 to cover costs the City attributed to training the petitioner at its police academy as the petitioner had terminated his employment with the City before serving a requisite five years of employment. In partial satisfaction of the $8,000 reimbursement, the City withheld the petitioner's two final paychecks and sued him for the remaining $6,619.92.

In upholding the trial court's entry of judgment for the employer, the California Court of Appeal held that the training cost reimbursement scheme was akin to an employer's incentive plan and was enforceable. The court concluded that the petitioner had not established a deprivation of the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*, hereinafter "FLSA"). Yet, inexplicably, the court remanded the petitioner's countersuit antithetically holding that the employer's seizure of the petitioner's paycheck could constitute an FLSA violation.[1]

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[1] After affirming the entry of judgment in favor of the City, the California Court of Appeal remanded the petitioner's countersuit brought under the FLSA for a determination as to whether the City's withholding of petitioner's paychecks may be barred by the FLSA's 2 or 3 year statute of limitations.

Such an outcome is both nonsensical and contravenes the well established, uniform federal policy enunciated by the regulations and interpretive letters of the Administrator of the Wage and Hour Division of the United States Department of Labor. The decision overturns the requirement of 29 C.F.R. § 531.35 mandating an employer to pay wages "free and clear" and "unconditionally." Similarly, the decision eviscerates a series of Wage and Hour Opinion Letters issued by the Administrator that have uniformly applied this regulation to invalidate any training repayment agreement where the obligation exceeds the federal minimum wage earned in the employee's final work week. The regulation and opinion letters, both entitled to controlling weight, form a coherent, national policy that requires employers to bear the costs of training their employees. As the primary beneficiary of the training, employers cannot transfer such costs to their employees.

Absent review by this Court, serious doubt is cast upon the Department of Labor's national policy. Moreover, because economic realities generally leave the employee unable to enter into meaningful negotiations with an employer, the employer will typically exercise unfettered discretion to determine not only the amount of any training reimbursement, but the requisite service commitment required of the employee. As there is no concomitant promise by the employer to keep the employee employed during this same period, the employee effectively suffers under the burden of a debt for which he/she is not the primarily beneficiary, and works more like an indentured servant than motivated by any incentive plan.

OPINIONS BELOW

The orders and judgment of the California Superior Court (per Smith, J.), granting the respondent's motion for summary judgment and denying petitioner relief on his cross-motion for summary judgment are reprinted at App. 43a-47a and 48a-52a, respectively. The judgment of the trial court entered thereon is reprinted at App. 53a-59a. None of the trial court orders nor the judgment is published.

The decision of the California Court of Appeal, First District, (per Sepulveda, J.), is reprinted at App. 1a-42a. It was modified and petition for rehearing was denied on July 15, 2008 and again on July 17, 2008. Both modifications are found at App. 60a-61a and 62a-63a, respectively. The decision, as modified, is published at 163 Cal.App.4th 1477, 78 Cal.Rptr.3d 621.

JURISDICTION

The original decision of the California Court of Appeal was rendered on June 17, 2008, and was modified with no change in decision following the court's denial of the petition for rehearing on July 15, 2008 and July 17, 2008. The California Supreme Court denied a petition for review on September 17, 2008, reprinted at App. 64a. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, WAGE AND HOUR ADMINISTRATOR INTERPRETATIONS AND REPAYMENT POLICIES INVOLVED

Tile 29, Section 206(a)(1) of the United States Code states in pertinent part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section . . . not less than $5.15 an hour beginning September 1, 1997.

Title 29, Section 531.3(d) of the United States Code of Federal Regulations, portions of which are reprinted at App. 92a that states in pertinent part:

> (2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business . . . .

Title 29, Section 531.32 of the United States Code of Federal Regulations, portions of which are reprinted at App. 93a-94a, states in pertinent part:

> (c) It should also be noted that under Sec. 531.3(d)(1), the cost of furnishing ``facilities'' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

Title 29, Section 531.35 of the United States Code of Federal Regulations, reprinted at App. 95a that states in pertinent part:

> Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee.

Title 29, Section 778.104, reprinted at App. 96a, that states in pertinent part:

> The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks.

United States Department of Labor, Wage and Hour Opinion Letter, dated October 21, 1992 (1992 WL 845111), fully reprinted at App. 65a-67a, states in part:

> The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer . . .the whole or part of the wage delivered to the employee.

United States Department of Labor, Wage and Hour Opinion Letter, dated September 3, 1999, (1999 WL 1788152), fully reprinted at App. 68a-70a, states pertinent in part:

> [T]he return to the employer of compensation due an employee under the FLSA would violate the statute. It is our opinion that, where a repayment plan would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA.

United States Department of Labor, Wage and Hour Opinion Letter, dated September 30, 1999, (1999 WL 1788162), fully reprinted at App. 71a-74a, provides, in part:

> The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. *Brooklyn Savings Bank v. O'Neil*, 328 U.S. 697 (1945). Similarly, in

> *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute.

United States Department of Labor, Wage and Hour Opinion Letter, dated May 31, 2005, (2005 WL 2086807), fully reprinted at App. 75a-79a, concludes:

> It is thus our opinion that any reimbursement paid by the officer that will result in payment of less than the amount required by the applicable minimum wage and/or overtime requirements will violate the "free and clear" provisions of the FLSA.

That portion of the Memorandum of Understanding ("MOU") between the City of Oakland and the Oakland Police Officers' Association, ("OPOA") entitled, "Police Officer Trainee Training Costs" reprinted at App. 80a-81a, states in part:

> The purpose of this provision is to insure that the recruit either accept a commitment of service to the City or be responsible for costs associated with Academy training. Thus the parties agree that any member who, prior to

> completing five years of service, voluntarily separates from service with the department shall be responsible for reimbursing the City, on a full or prorata basis, for the $8,000 cost of his or her training at the Police Academy.

The "Conditional Offer of Position as a Police Officer Trainee with the City of Oakland," dated December 10, 1997, fully reprinted at App. 82a-85a, states:

> The City of Oakland Police Department hereby notifies you that you have been selected for a position as a Police Officer Trainee, subject to the following conditions: you . . . accept the training reimbursement provisions specified below. . . .Before the end of year 1 - 100% repayment of $8,000
>
> Before the end of year 2 - 80% repayment of $8,000
>
> Before the end of year 3 - 60% repayment of $8,000
>
> Before the end of year 4 - 40% repayment of $8,000
>
> Before the end of year 5 - 20% repayment of $8,000

The "Training Cost Repayment Agreement," dated February 16, 1999, reprinted at App. 86a-87a, states in pertinent part:

> In accordance with the Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association, I hereby acknowledge that I am obligated to repay the City of Oakland for training costs incurred while I was employed as a Police Officer Trainee. The total amount owed to the City of Oakland is $8,000, minus the amount of my final paycheck in the amount of $ 0 leaving a balance of $8,000.00.

STATEMENT OF THE CASE

A. Factual Background

Municipal agencies such as the City of Oakland are required by the State of California, Commission on Peace Officers Standards of Training, ("POST") to deploy only those persons who have completed a POST certified police academy.[2]

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[2] *See*, Cal. Penal Code §§ 832(a), "Every person described in this chapter as a peace officer shall satisfactorily complete an introductory course of training prescribed by the Commission on Peace Officer Standards and Training." *See also:* Cal. Pen. C. § 13510, generally authorizing POST to create and monitor peace officer training regimens; 11 Cal. Code Regs. § 1005(a)(1), " Every peace officer, except Reserve Levels II and III, those peace officers listed in Regulation 1005(a)(3) [peace officers whose primary duties are investigative], and 1005(a)(4) [coroners or deputy

In order to encourage newly recruited police officers trainees to stay in the employ of the City of Oakland, the City and the OPOA, the collective bargaining unit for Oakland police officers, entered into an agreement whereby those who were hired by the City as "Police Officer Trainees" were required to reimburse the City for its costs of training these persons at the City's in-house police academy. This sum was stipulated to be $8,000.

The agreement, reprinted at App. 80a-81a, required the recruit to remain in the employment of the City's police department for a period of five years in order to work off the entire $8,000 repayment obligation. For each full year the employee served in the police department's employ, the obligation was reduced by twenty percent. The obligation was imposed for any reason the employee separated employment with the police department. Further, the agreement between the City and the OPOA did not guaranty the employee any contractual right to continued employment with the City.

Concluding, this provision of the MOU stipulated that the repayment obligation, "shall be due and payable at the time of separation and the City shall deduct any amounts owed under this provision from the employees final paycheck." Any shortage was agreed to be "thereupon due and owing." (App. 81a.)

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coroners], shall complete the Regular Basic Course before being assigned duties which include the exercise of peace officer powers. Requirements for the Regular Basic Course are set forth in PAM, section D-1-3."

In the Fall of 1997, petitioner was desirous of becoming a police officer. He applied and completed a series of entrance examinations including physical agility and mental acuity testing and an oral interview. He did well and was sent a letter from the City's police department entitled, "Conditional Offer of Position as a Police Officer Trainee with the Oakland Police Department," reprinted at App. 82a-85a. This letter contained the following:

> Reimbursement provisions: You may be required to reimburse the City of Oakland for training expenses. Reimbursement would be required in the event you voluntarily terminate your employment with the Oakland Police Department, according to the following schedule:
>
> Before the end of year 1 -
> 100% repayment of $8,000
>
> Before the end of year 2 -
> 80% repayment of $8,000
>
> Before the end of year 3 -
> 60% repayment of $8,000
>
> Before the end of year 4 -
> 40% repayment of $8,000
>
> Before the end of year 5 -
> 20% repayment of $8,000

In order to receive the position, the petitioner was required to execute the terms of the reimbursement agreement or the City would not continue to process his application for employment. Petitioner signed the "Conditional Offer" on December 10, 1997. On March 16, 1998, the petitioner was hired by the City as a police officer trainee and was directed to attend the City's police academy. The petitioner was again required to sign an acknowledgment entitled "reimbursement of training expenses" that restated the reimbursement obligation contained in the "Conditional Offer."

The City's police academy was certified by California POST. It was owned, operated, staffed and managed entirely by the City of Oakland. While other state certified academies exist that have significantly lower costs to those attending, the City had a policy of sending its police trainees to its own police academy. Petitioner had no choice in the matter.

The petitioner graduated the police academy in November 1998. Despite this success, once the petitioner was assigned to his initial patrol assignment, his field training officer ("FTO") noted deficiencies in his performance. In February 1999, the FTO suggested that the petitioner resign in lieu of termination owing to continuing performance deficiencies. The petitioner followed this advice and resigned on February 10, 1999. He has not worked as a police officer since.

As the petitioner was concluding his employment, the City presented the petitioner with a document entitled, "Training Cost Repayment Agreement." This document restated the reimbursement obligation of the MOU and asserted that the City was due $8,000 from the petitioner for the training it had provided him. It set out a proposed installment plan for the repayment of the obligation. (App. 86a-87a). The petitioner signed this document on February 16, 1999.

For his final work week ending February 19, 1999, the petitioner's paycheck reveals he worked 40 hours and earned one hour of compensatory time. (App. 88a-89a) This resulted in a gross income of $935.76 (40 x $23.39400 per hour). The net amount of this check after deductions was $725.28.

In April 1998, the City issued another check to the petitioner for retroactive pay. (App. 90a-91a) This check represented gross pay in the amount of $1,014.42, with net pay being $654.80. However, pursuant to the MOU, the City withheld both checks and applied their net sums to reduce the $8,000 reimbursement obligation claimed by the City.[3]

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[3] The judgment entered against the petitioner in the amount of $6,619.92 was calculated by the trial court as follows: $8,000 less ($725.28 + $654.80) + $100 "collection fee" sought by the City.

B. Procedural History

On October 17, 2001, the City sued the petitioner for breach of contract in the Superior Court of California, County of Alameda. On May 10, 2002, the petitioner filed his answer and countersued the City.

In his answer, the petitioner alleged as an affirmative defense that the FLSA, and more specifically 29 C.F.R. § 531.35, trumped enforcement of the alleged contract for reimbursement. Similarly, in his countersuit, he averred, among other claims, that the City's withholding of his final paychecks violated the FLSA. Owing to the petitioner's military deployment, the case was stayed for a period of time. Ultimately, the City and the petitioner completed discovery and filed cross-motions for summary judgment in the Fall of 2006.

The trial court granted the City's motion in its totality, concluding that there was no genuine dispute since the petitioner admitted signing the reimbursement obligation acknowledgments and not repaying the City its claimed training costs. (App. 44a). The trial court specifically rejected petitioner's argument that the City's reimbursement agreement obligation resulted in conditional payment of wages in violation of 29 C.F.R. § 531.35. (App. 45a-46a)

In granting the City's motion and denying the petitioner's cross-motion, the trial court adopted the City's argument that the outcome was controlled by the decision in *Heder v. City of Two Rivers, Wisconsin*, 295

F.3d 777, 782-783, stating, "The *Heder* decision clearly holds that a requirement that employees reimburse certain training costs if they resign before the employer receives its intended benefit from the training does not violate the FLSA." (App. 50a)

The trial court further dismissed the application of the Administrator's Wage and Hour Opinion Letters, stating:

> During oral argument, counsel [for petitioner] argued that three United States Department of Labor opinion letters clearly support [petitioner's] position. Having reviewed the opinion letters again, the Court does not agree with counsel's argument. The 1992 and 2005 opinion letters are not applicable because the alleged policies challenged therein require police officers to reimburse the salaries that they were paid during the period of their training. The policy of the State of Washington challenged in the 1999 opinion letter appears to be similar to the City's reimbursement policy, but it is not clear from the brief opinion that the employees are required to reimburse training costs only and not salary paid during training.[4]

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[4] The court refers to that Wage and Hour Op. Ltr., dated September 30, 1999, (1999 WL 1788162) reprinted at App. 71a-74a.

Judgment was entered against the petitioner and in favor of the City on October 5, 2006. (App. 53a-59a). Timely appeal was taken to the First District Court of Appeal for California. On June 17, 2008, the Court of Appeal affirmed enforcement of the City's reimbursement agreement. The court rejected the petitioner's argument that the "free and clear" and "unconditional" payment requirements of 29 C.F.R. § 531.35 voided the reimbursement obligation. Like the trial court, the Court of Appeal found the decision in *Heder* controlling. (App. 10a)

The appellate court held the City of Oakland's training reimbursement agreement analogous to that upheld by the Seventh Circuit Court of Appeal in *Heder* where that court had likened a fire fighter training reimbursement obligation to "other valid incentives that employers offer their workers to stay with them." (App. 11a, *Heder* at 780-781) The court concluded:

> Likewise here, Oakland was permitted to seek reimbursement from police officers who gained the benefit of its training program at the Oakland Police Academy but did not stay with the police department long enough for Oakland to benefit from that training. (App. 11a)

Like the trial court, the Court of Appeal rejected application of any Wage and Hour Opinion Letter authored by the Secretary of Labor. (App. 12a)

In applying *Heder*, the Court of Appeal noted that Wage and Hour, Op. Ltr., dated May 31, 2005, had referenced the decision in *Heder,* "albeit for a different point." Consequently, the Court of Appeal erroneously concluded that this was, "[A]n indication that the Department of Labor would not disapprove of the type of reimbursement agreement at issue there." (App. 12a)

The Court of Appeal concluded that the petitioner had not established that the reimbursement agreement constituted a violation of the FLSA. This conclusion was based on the fact no evidence was presented that showed that the City had deducted the $8,000 in any work week, or had deducted training costs from the petitioner's paychecks as these were incurred in the course of training. (App. 15a)

However, the Court of Appeal went on to conclude that the City's withholding of the petitioner's final paycheck was not permitted under the FLSA. On this point the court stated, "As Hassey correctly notes, the FLSA mandates that employers such as Oakland pay their employees at least the statutory federal minimum wage. . . That means, quite simply, that Hassey was entitled to at least the statutory minimum wage for the final pay period he worked." (App 18a-19a)[5]

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[5] The court further concluded that the trial court had erroneously held that the relief under the FLSA for this violation was precluded by the two year statute of limitations. It remanded that portion of the petitioner's countersuit for a determination as to whether the City's withholding of the petitioner's check was

The Court of Appeal modified the opinion and denied rehearing on July 15, 2008, (App. 60a-61a) and on July 17, 2008, (App. 62a-63a) with no change in judgment. The California Supreme Court denied review on September 17, 2008. (App. 64a)

REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. First, the California Court of Appeal's decision invites employers and courts alike into error by focusing the inquiry on the method by which the employer passes the training cost to the employee. This approach is flawed. As acknowledged by a recent district court opinion, "The relevant issue under the FLSA is not the method of passing a cost along to the employee, but whether the cost is one that may be passed along at all." *Rivera v. Brickman Group, Ltd.*, 155 Lab Cas. P. 35,388 (E.D. Pa. 2008)

Moreover, in its reliance on the holding of *Heder*, the decision below erroneously validates training reimbursement agreements under the FLSA, not on a detailed analysis of decisions, regulations and interpretive letters applying the FLSA to such agreements, but on a discussion arising from what the Seventh Circuit summarized as "Heder depict[ing] a repayment obligation as a covenant not to compete that is invalid under Wis. Stat § 103.465." *Heder* pg. 780.

"wilful" within the meaning of 29 U.S.C. § 255(a), see App. 25a-27a.

To the extent that the Seventh Circuit did conduct a review of the reimbursement agreement presented therein under the FLSA, the court stated the following:

> "What else needs to be repaid [to the City of Two Rivers]? The [reimbursement agreement] seems to call for the repayment of the overtime compensation, but as we have already observed, this violates the FLSA to the extent that it would leave Heder with less than time and a half for all overtime hours." *Heder* pg. 782.

Thus, it becomes apparent that the decision below is woefully flawed in its analysis. Nonetheless, this decision will lead employers and courts alike to incorrectly assume that it is the *method* by which employers impose training reimbursement obligations on their employees that is the dispositive factor to a determination of enforceability. Unless resolved by this Court, more and more employers will impose such obligations; the cumulative effect being whole classes of employees will lose their minimum wage protections at a time that wages are stagnating or are declining.

Second, because Congress never addressed the specific issue as to whether an employer may seek to recover training costs from employees in the statutes of the FLSA itself, the Administrator of the Wage and Hour Division of the Department of Labor has adopted a detailed and thoughtful scheme of regulations and interpretive letters that resolve the question.

As noted by this Court, "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843-844 (1984).

Here, the Administrator adopted regulations defining what costs could permissibly be passed on to the employee by defining what costs would be considered "wages" if these were paid by the employer and counted as a credit against the federal minimum wage. (29 C.F.R. § 531.32(a), reprinted at App. 93a) Further, the Administrator specifically curtailed what employers could claim as wage credits, and consequently permissible "costs" by examining who was the "primary beneficiary." (See, 29 C.F.R. §§ 531.3(d); 531.32(c), reprinted at App. 92a and 94a). Where the employer is the primary benefactor, the Administrator concludes that the cost cannot permissibly be borne by the employee.

Finally, in an effort to stem evasion of the FLSA by employers who might be inclined to recoup some or all of the federally protected minimum wage, the Administrator adopted regulations requiring the employer to pay employees "free and clear" and "unconditionally" (29 C.F.R. § 531.35). Taken as a whole, these regulations and interpretive letters provide a comprehensive and rational basis for determining the enforceability of training cost

reimbursement agreements. Yet the decision below disregards this approach and instead simply affirms an employer's unfettered right to recover training costs.

I. THE COURT SHOULD CLARIFY THAT TRAINING REIMBURSEMENT AGREEMENTS ARE VOID WHERE THEY DEPRIVE THE EMPLOYEE OF THE FEDERAL WAGE PROTECTIONS

This Court has never been called upon to decide whether or not training reimbursement agreements are enforceable. However, as our national economy falters, employers everywhere are seeking methods of lowering their costs of business. Public employers, like the City of Oakland, are no exception. Indeed, in some municipalities, police training reimbursement obligations are now imposed as a matter of code and carry a reimbursement demand in excess of $50,000.[6]

The rub against the FLSA created by training reimbursement agreements is that under the FLSA, each work week stands alone. (29 U.S.C. 206; 29 C.F.R. 778.104, reprinted at App. 96a). Pragmatically, this means that reimbursement obligations incurred at the

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[6] See for example the City of Los Angeles Administrative Code, Section 4.1700 imposes a five year minimum service commitment and requires officers to sign a reimbursement agreement obligating them to pay up to $60,000 for that city's academy expenses. Admin Code found at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn_default.htm&vid=amlegal:laac_ca while a copy of that city's reimbursement agreement can be found at http://forwardthinkers-drthompson.com/adj3/lapd_trng_reimburse.pdf

time an employee terminates his or her employment, cannot invade into either the minimum wage or the contractual overtime rate of pay protected by the FLSA.

Like the City has argued to the courts below, employers are likely to assert that over the term of the employee's service, the employee has earned more than required by the FLSA, and consequently, the FLSA is not violated. This is error for the reasons discussed above. Further, whether the employee's final paycheck is withheld, or the employee is sued and must pay for the training costs from other sources, his or her effective minimum wage earned in the final work week of employment is reduced.

In 1972, the Fifth Circuit was called upon to resolve the enforceability of an ostensibly "voluntary" repayment agreement whereby employees reimbursed their employer for shortages occurring during their shift. There, the court held:

> With the employee's financial picture burdened with the 'valid debt' of the shortages, he is making less for his services than the wage that is paid to him. Whether he pays the 'valid debt' out of his wages or other sources, his effective rate of pay is reduced by the amount of such debts. When it is reduced below the required minimum wage, the law is violated. *Mayhue's Super Liquor Stores v. Hodgson,* 464 F.2d 1196, 1999 (1972).

Further, training is a cost that primarily benefits the employer. In this matter, the City was under a statutory obligation to deploy as sworn peace officers only those persons who had received police academy training that was certified by the California Commission on Peace Officer Training. The City chose to meet this obligation by establishing its own police academy and sending trainees, like the petitioner, to this in-house training facility. Like the petitioner herein, employees will follow the training dictates of their employers and will learn what their employer's teach in order to carry out the wishes of the employer. In so doing, the employer is the direct beneficiary of the training process by improving productivity. (See, 29 C.F.R. § 531.3(d)(1)). Indeed, training is tantamount to "tools of the trade and other materials and services incidental to carrying on the employer's business," a recognized cost of the employer under 29 C.F.R. § 531.3(d)(2). (App. 92a)

In applying these regulations, the Administrator has successfully invalidated training reimbursement agreements in district courts in instances where the employee is deprived of FLSA wage protections in the final work week in which the employer enforces the repayment obligation. (See for example: *Chao v. Bauerly, LLC.* 2005 WL 1923716 (D. Minn. 2005), holding unenforceable a training cost reimbursement agreement for truck drivers where the employer sought to recover $750 for initial driver training where the employee failed to work one year for the employer and the employer withheld the driver's final paycheck in partial satisfaction).

In this matter, the petitioner worked forty hours in his final work week ending February 19, 1999. (App. 88a-89a) At that time, the federal minimum wage was $5.15. The petitioner was entitled to be paid $206 and to leave with this amount as a minimum compensation for his service in that week. Unfortunately, pursuant to the MOU and the Conditional Offer, the City withheld the petitioner's entire final paycheck in partial satisfaction of its claim to recover training costs. It withheld a second check issued two months later. (App. 90a-91a) It subsequently sued the petitioner. Unlike the district court in *Chao*, the California Court of Appeal differentiated between enforceability of the reimbursement agreement, which it upheld under *Heder*, and the fact that the City withheld the final paychecks of the petitioner which the court concluded could expose the employer to liability. This nonsensical approach parses an analysis under the FLSA into enforceability of the reimbursement agreement and liability for withholding final paychecks. This evades the protections of FLSA by permitting an employer to recoup costs not otherwise permissible simply by having the employee pay back the employer from sources other than a withheld paycheck.

In *Arriaga v. Florida Pacific Farms, LLC.*, 305 F.3d 1228, (11th Cir. 2002) the Eleventh Circuit implicitly rejected such an approach saying:

> [T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to

> bear. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment. See id. § 531.35." *Id.* Pg 1236.

In *Arriaga*, Florida fruit growers had required Mexican farm workers to execute an employment agreement under which they were to advance the costs of their H-2A visas, a $6 entry fee charged at the border, and transportation costs from Monterrey, Mexico to their work sites in Florida. These costs total approximately $275. At the conclusion of fifty percent of the employment contract with the employee, the grower would reimburse the employee $120 of the costs that permitted the employee to work for the growers. At the conclusion of the contract, and only for those employees still remaining in employment with the growers, the employee would receive a bus ticket back to Loredo, Texas and twenty dollars for the remaining bus trip to Monterrey, Mexico. The employees brought suit alleging that they were deprived of the right to a minimum wage in the first week of employment because they had not been reimbursed for the costs that they advanced.

The Eleventh Circuit, relying on 29 C.F.R. §531.35 agreed. The court acknowledged that 29 C.F.R. §776.4 requires a court to look to see if there is a FLSA violation in any work week, not over the tenure of employment, *Id.*, pg 1237.[7]

II. THE DECISION DEPARTS FROM A WELL ESTABLISHED, UNIFORM, NATIONAL POLICY OF THE DEPARTMENT OF LABOR

As has been observed by this Court, "[A]n agency is entitled to deference when it adopts a reasonable interpretation of its regulations, unless its position is 'plainly erroneous or inconsistent with the regulation,'" *Auer v. Robbins*, 519 U.S. 152, 461 (1997). As observed by the Ninth Circuit, "[T]he Secretary of Labor's interpretation of her own regulations is entitled to deference and is controlling unless "plainly erroneous or inconsistent with the regulation." *Webster v. Public School Employees of Washington*, Inc., 247 F.3d 910, 914 (9th Cir. 2001) ("We must give deference to DOL's

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[7] The California Court of Appeal mistook petitioner's oral argument to suggest that *Arriaga* required the court to examine the petitioner's pay during his course of attending the police academy at the beginning of his employment in order to determine if an FLSA violation had transpired. This was not the case. The petitioner had actually attempted to articulate *Arriaga* stood for the proposition that costs benefitting the employer could simply never reduce the federal wage in any week, be that at the beginning, middle or end of the employment relationship. Where the reimbursement obligation accrues in the final work week, the petitioner would stipulate that this week is the operative examination period for any FLSA violation.

regulations interpreting the FLSA.")." *Bothell v. Phase Metrics, Inc.* 299 F.3d 1120, 1129 (9th Cir. 2002)

The Administrator has shed light on and essentially resolved the question as to enforceability of training reimbursement agreements in a series of opinion letters applying the relevant regulations.

On September 3, 1999, the Administrator responded to the following request for an opinion as to the enforceability of training reimbursement agreements. It began:

> This is in response to your letter requesting the Department's position on the application of the Fair Labor Standards Act (FLSA) to required reimbursements for internal training costs. You specifically ask if it is permissible for an employer to establish a repayment plan for employee internal training costs which would require an employee who leaves employment within an agreed-upon time period after receiving training to reimburse the employer for such training. The repayment plan would include an agreed upon value of the internal training and would be signed by the employee prior to receiving the training. (App. 68a)

After setting forth the applicable regulation (29 C.F.R. § 531.35), the Administrator responded:

> [T]he return to the employer of compensation due an employee under the FLSA would violate the statute. It is our opinion that, where a repayment plan would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA. (App. 69a)

This opinion is the second in a series of four addressing the issue. The first, Op. Ltr., October 21, 1992, (1992 WL 845111), fully reprinted at App. 65a-67a, simply declared in pertinent part:

> The wage requirements of the FLSA will not be met where the employee "kicks-back directly or indirectly to the employer . . .the whole or part of the wage delivered to the employee.

On September 30, 1999, the Administrator issued Op. Ltr. (1999 WL 1788162), fully reprinted at App. 71a-74a. It observed and concluded in part:

> The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. *Brooklyn Savings Bank v. O'Neil*, 328 U.S. 697 (1945). Similarly, in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Supreme

> Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute.

This series of opinion letters concluded with Op. Ltr. May 31, 2005, (2005 WL 2086807), fully reprinted at App. 75a-79a. It stated in part:

> It is thus our opinion that any reimbursement paid by the officer that will result in payment of less than the amount required by the applicable minimum wage and/or overtime requirements will violate the "free and clear" provisions of the FLSA.

Albeit two of these opinion letters addressed the recovery of wages paid trainees if they left before a specified date, two letters addressed the recovery of training costs incurred by the employer in training the employee. All letters concluded that such agreements were impermissible where the reimbursement deprived the employee of the federally protected wage rights. Unfortunately, the decision below departs from this sound train of logic.

In rendering its decision, the California Court of Appeal simply held that the City was not seeking to recover salary paid to the petitioner and dismissed two letters as irrelevant.

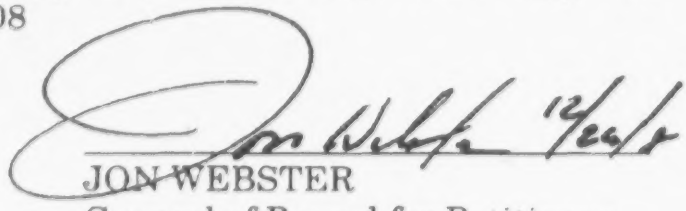
Further, the court below appears not to have specifically considered the September 3, 1999 letter, while it dismissed as "unclear" the September 30, 1999 letter.

These letters form an unbroken, uniform approach to determining if a reimbursement agreement is lawful. The wholesale abandonment by the court below of the controlling weight of these letters places in jeopardy the national approach pursued by the Department of Labor. This Court should confirm the Department's approach.

CONCLUSION

For each of the aforementioned reasons, the petitioner respectfully requests this Court grant his petition for certiorari.

Respectfully submitted this 15th day of December, 2008



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